Grinnell Fire Protection Systems Company *and* Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO. Case 17–CA–19409

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On October 26, 2000, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions and to adopt the recommended Order as modified.[2]

In adopting the judge's recommended broad cease-and-desist Order, we find that the Respondent has demonstrated a proclivity to violate the Act. Under *Hickmott Foods*, 242 NLRB 1357 (1979), repeat offenders with such a proclivity are subject to broad injunctive relief.

We note that, in addition to the instant case, the Respondent violated the Act in the following cases: *Grinnell Fire Protection Systems*, 332 NLRB 1257 (2000) (refusal to provide union with requested information); *Grinnell Fire Protection Systems*, 328 NLRB 879 (1999), enfd. 236 F.3d 187 (4th Cir. 2000) (threats of layoff and job loss; requiring and inducing resignation from union; implying to employees that unfair labor practice strikers can be permanently replaced; retaliatory layoffs for engaging in protected activity; promising higher wages to induce employees to abandon union and abandon strike; refusal to meet and bargain in good faith with union; unilateral change in terms and conditions of employment by implementing final contract offer prior to reaching good-faith impasse in bargaining; bypassing union and making direct wage offers to unit employees); *Grinnell Corp.*, 320 NLRB 817 (1996) (telling employee he would not be recalled from layoff because he engaged in union activities; threatening employee with retaliation if he pursued reparations for past layoffs or filed grievances; threatening employee with discharge if he filed charges against employer with the Board; refusing to employ individual because he engaged in union activity, filed charges, and pursued his Sec. 7 rights; note related case: *Road Sprinkler Fitters Union Local 699 v. Grinnell Fire Protection Systems*, 155 LRRM 2184 (E.D.Pa. 1997); note also*: Plumbers Local 669 (Grinnell Fire Protection)*, 296 NLRB 256 (1989) (Grinnell Corp. is parent of Grinnell Fire Protection)); *Grinnell Fire Protection Systems*, 307 NLRB 1452 (1992) (telling employees or union representatives that employees will not be recalled to work or rehired because they filed grievances against employer). We also note that a broad order was imposed in *Grinnell Corp.*, 320 NLRB 817, supra. Consequently, we find that the Respondent is a repeat offender with a proclivity to violate the Act. Thus, we shall impose the broad cease-and-desist Order recommended by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Grinnell Fire Protection Systems Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Constance Traylor, Esq., for the General Counsel.
Peter Chatilovicz, Esq. and *Charles F. Walters, Esq. (on Brief),* for the Respondent.
William W. Osborne, Esq., for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issue presented is whether the Respondent's offers of reinstatement to five unfair labor practice strikers violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[1] This case was heard at Tulsa, Oklahoma on July 18–19, 2000. All dates in this decision refer to 1997 unless otherwise specified.

[2] 29 U.S.C. § 158.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is in the business of installing and maintaining automatic sprinkler and fire protection systems throughout the United States. The Union represents the Respondent's fitter foremen and fitters. Since on or about April 12, 1994, the Union has engaged in a nationwide strike against the Respondent. In 1994 the Union filed unfair labor practice charges with the Board centered on allegations that the Respondent had violated the Act by its bad faith bargaining. The Board ultimately issued a decision concerning those matters on May 28, 1999. (*Grinnell Fire Protection Systems Co.*, 328 NLRB 879 (1999) (*Grinnell I)*. The Board held that on April 12, 1994, the Respondent had prematurely declared an impasse in its negotiations with the Union and unilaterally implemented changes in wages, hours and other terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act. The employees' strike was determined to be an unfair labor practice strike from its inception. As part of its order remedying the Respondent's unfair labor practices, the Board directed that the Respondent restore to the unit employees the terms and conditions of employment that were applicable prior to April 14, 1994. The Board's decision is presently pending appeal before the Fourth Circuit Court of Appeals.[3]

The present case involves the Respondent's Tulsa, Oklahoma facility. Billy J. Cofer, Edward L. Culbert, Charlie Wayne Gunkel, Jerry Spencer and Robert Hensley were among the Respondent's employees who became unfair labor practice strikers on April 12, 1994. They continued to be on strike at the time of the hearing. In August and September of 1997 these men sought employment with the Respondent at its Tulsa location. The Respondent ultimately offered employment to each of them at terms and conditions that were consistent with the Respondent's wages and benefits that the Board found in *Grinnell I* to have been unlawfully implemented. It is not disputed that the offers were less generous in their terms than what the employees had been earning prior to April 14, 1994.

The Government's present complaint alleges that since on or about August 26, 1997, the Respondent has refused to reinstate the employees to their former positions of employment in that it conditioned their reinstatement upon them agreeing to accept the unlawfully implemented terms and conditions of employment. The Respondent argues that some of the offers to return to work were not unconditional. It also notes that it has appealed the Board's decision in *Grinnell I* and asserts that it would be disadvantaged if required to rehire the men at the more costly wages and conditions as they existed prior to April 14, 1994. The Respondent advocates that the proper procedure is for its appeal to be decided, and, should the Board prevail, then it would be legitimately required to make the men whole for any losses suffered.

[3] *Grinnell Fire Protection Systems Co. v. NLRB*, (Nos. 99-1754, 99-1900, 99-2122).

III. THE OFFERS TO RETURN TO WORK ON BEHALF OF COFER, CULBERT, GUNKEL AND SPENCER

On August 8-10,1997, the Respondent advertised in a Tulsa newspaper for fire sprinkler piping installers. The advertisement noted that the pay was for positions up to $20.73 per hour. On August 26 Union Business Agent Steve Montgomery and striking employee, Ed Culbert (who was working on special assignment for the Union at the time) went to the Respondent's Tulsa office. They met with Respondent's district general manager, Dewayne Ward. Montgomery gave him a written request for information and some employment application forms. Four of the applications were from striking employees, Cofer, Culbert, Gunkel, and Spencer. Montgomery and Culbert testified that Montgomery told Ward that he was making an unconditional offer on behalf of the four unfair labor practice strikers for them to return to work. Ward testified that Montgomery did not state anything about an unconditional offer to return to work, but he did understand that the strikers' applications were being proffered for the purpose of their being hired. Ward told the Union representatives that he would have to consult with others and the meeting ended. The Respondent does not contend that Montgomery set any conditions upon the strikers' return to work. *Consolidated Dress Carriers, Inc.,* 259 NLRB 627, 636–637 (1981). Based on the demeanor of the three witnesses to this conversation, and the record as a whole, I find that Montgomery did tell Ward that he was making an unconditional offer for Cofer, Culbert, Gunkel, and Spencer to return to work. I find that the Respondent did not meet its burden of showing that the offer was less than unconditional. *NLRB v. Okla-Inn,* 488 F.2d 498, 505 (10th Cir. 1973). See generally *Spentonbush/Red Star Cos.,* 319 NLRB 988, 989–990 (1995), enf. denied 106 F.3d 484 (2d Cir. 1997). In sum, I find that unconditional offers to return to work were made by Montgomery on behalf of Cofer, Culbert, Gunkel, and Spencer.

Ward testified that he subsequently spoke with higher management to confirm that the applicants were strikers. He also reassured himself as to the company's policy that the strikers were to be offered the terms and conditions implemented by the Respondent in April 1994 rather than those contained in the expired collective-bargaining agreement. Based on his understanding that he was correct about what to offer the strikers, Ward started contacting Cofer, Culbert, Gunkel, and Spencer on September 10 to offer them employment.

A. Billy Cofer

On September 17 Ward telephoned Cofer and they discussed employment. Ward stated that the Respondent had adopted a different retirement plan and insurance format. Ward's notes of the conversation credibly show that he also advised Cofer that the wages and benefits being offered were the same as those offered April 13, 1994, when the strike commenced. The following Friday Cofer met with Respondent's representatives Steve Rasch and Kenny Starks. Cofer testified that Rasch said that most of the available work was at only 75 percent of the old contract rate, and that he could not guarantee any work at

100 percent of the former rate. Cofer told Rasch that he was not interested in working for only 75 percent of the former rate. Cofer never accepted the Respondent's employment offer.

B. Charlie Wayne Gunkel

Gunkel received a telephone call from Ward, inviting him to an interview. Gunkel met with Ward and Rasch on approximately September 17. Ward told Gunkel that Respondent had no need for any foremen, but that Respondent did have work for journeymen at around $15 per hour. Gunkel said that he was worth more than that. Gunkel testified that he was not specifically offered a job but was told that the Respondent would be in touch with him if he were needed. In contrast to this testimony, Ward testified that he and Rasch offered Gunkel reinstatement when he met with them. Ward's testimony and contemporaneous notes on this meeting expressly indicate that Gunkel said he had already "committed to" the job in Texas at the time he spoke with Ward. Gunkel never contacted Grinnell about returning to work following his meeting with Ward. I found Gunkel to be an uncertain witness as to what was said at his meeting with Respondent's representatives. In contrast, Ward had a good recollection of the encounter, and I credit his version of what was said. I find Gunkel was offered employment at the implemented rates, and that he did not accept the offer.

C. Jerry Spencer

Ward telephoned Spencer on approximately September 11 and told him that employment was at the implemented rates (approximately $15.30). Spencer, a long time acquaintance of Ward, testified that he felt certain that Ward would know that wage rate would be unacceptable and was a joke by Ward. Spencer testified that he decided to "joke back" and told Ward that he intended to return to work at that rate. Spencer never showed up to work for the Respondent. I find that Spencer did not accept the Respondent's offer of employment.

D. Ed Culbert

On approximately September 18 Ward telephoned Culbert and offered him employment at the implemented rates. Culbert queried Ward about the Respondent's newspaper advertisement that stated a higher wage rate. Ward said that newspaper rate was only applicable in the Northeast, and that there were no union jobs in the Tulsa area. Culbert told Ward that he would think about the offer. Culbert decided not to accept the Respondent's offer of employment as the pay and benefits were substantially less than the expired collective-bargaining rates.

IV. HENSLEY'S OFFER TO RETURN TO WORK

Striker Robert Hensley telephoned the Respondent's office on September 18, 1997. He was unable to talk with anyone in authority and left a message with a secretary. She recorded the message that, "He would like an unconditional offer to return to work." The secretary did not testify at the hearing. Hensley testified he told the secretary he wanted his old job back. He was uncertain about whether he mentioned he was making an unconditional offer to return to work when he spoke to her, or subsequently when he spoke with Ward.

Ward telephoned Hensley that same evening. Ward testified that he asked Hensley to clarify the message he had left with secretary. He recalled Hensley responded that, "I just want to make an unconditional offer." Ward told Hensley that he was still uncertain exactly what he meant, but that there were jobs available at the wages and benefits implemented in April 1994. Hensley told Ward that he would consider that offer. Hensley did not contact the Respondent thereafter to accept employment at the implemented rates. I found Hensley to have a clouded memory of his conversations with the Respondent's representatives concerning obtaining employment. I found Ward's testimony of his conversation with Hensley to be the most credible version of what was said. Based on Hensley's message left with the secretary and Ward's credited version of what was said between he and Hensley, I find that Hensley did make an unconditional offer to return to work and never accepted the Respondent's offer of employment.

V. ANALYSIS

Unfair labor practice strikers who make unconditional offers to return to work are entitled to immediate reinstatement to their former positions. *Laidlaw Corp.,* 171 NLRB 1366, 1368 (1968). They are entitled to reinstatement whether or not replacements for them have been hired. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Johnson Sheet Metal, Inc.,* 442 F.2d 1056, 1061 (10th Cir. 1971. I have found that Cofer, Culbert, Gunkel, Spencer, and Hensley did make unconditional offers to return to work.

In *Alwin Mfg. Co.,* 326 NLRB 646 (1998), the judge, with Board approval, found that the Respondent violated the Act, in part, when it offered unfair labor practice strikers employment at terms equal to the Respondent's unlawfully implemented final contract offer. The *Alwin* judge stated:

> Also, contrary to the Company's response offering possible eventual employment under the terms and conditions contained in the Respondent's implemented final contract proposal, the striking employees, after the unconditional offer to return, became entitled to be immediately called back to work under the terms and conditions of employment set forth in the collective bargaining agreement that had expired on February 28, 1994, including the there-prescribed pay, benefits and job classifications; free of the unilateral changes found unlawful in *Alwin I.* As the Board held in *Spentonbush/Red Star Companies* (319 NLRB 988 (1995), enf.. denied 106 F.3d 484 (2nd Cir. 1997)):
>
> > An employer's offer to reinstate unfair labor practice strikers based on terms and conditions that have been unlawfully imposed is not a valid offer. *White Oak Coal Co.,* 295 NLRB 567, 572 (1989, enfd. sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987) (footnote omitted).

The Respondent in the present case conditioned its offers to the unfair labor practice strikers upon their accepting terms that the Board found to be unlawful in *Grinnell I.* In addition, the Respondent did not offer immediate reinstatement to Cofer, Culbert, Gunkel, and Spencer, rather it delayed communicating its conditional offer for approximately 2 weeks. In sum, I find that the Respondent did not meet its obligations under the Board's order to offer unfair labor practice strikers who had

unconditionally offered to return to work immediate reinstatement to their former positions and at their former rates. I find that the Respondent thus violated Section 8(a)(1) and (3) of the Act.

In *Tony Roma's Restaurant*, 325 NLRB 851, 852 (1998), the Board stated that it will not evaluate a discriminatee's response to a reinstatement offer until the respondent has proven that the offer is a valid one. See also *Consolidated Freightways*, 290 NLRB 771, 772–773 (1988). The offers of employment made to the five discrimantees in this case were unlawfully conditioned. I find that the discriminatees' refusal to accept such invalid offers does not waive their rights to reinstatement. *White Oak Coal Co.,* 295 NLRB 567, 572 (1989).

CONCLUSIONS OF LAW

1. Grinnell Fire Protection Systems Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Road Sprinkler Fitters Local Union No. 669, U. A., AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Grinnell Fire Protection Systems Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to immediately reinstate Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, or any other unfair labor practice striker, to their former pre-strike positions after their unconditional offer to return by conditioning their reinstatement upon their acceptance of the terms and conditions of employment set forth in its unlawfully implemented final contract proposal of April 1994.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board's Order, rescind and invalidate all offers of reinstatement to unfair labor practice strikers that are contingent upon their accepting the Respondent's unlawfully implemented wages and benefits put into effect in April 1994.

(b) Within 14 days from the date of the Board's Order, offer unfair labor practice strikers Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, immediate and full reinstatement to their former prestrike jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing if necessary any employees hired as replacements for them.

(c) Make the aforementioned employees whole from the date of their unconditional offers to return to work in accordance with the *Grinnell I* remedial Order of the Board, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the refusal of Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, to accept employment on the terms previously offered them by the Respondent, and within 3 days thereafter notify the employees in writing that this has been done and that their prior refusal to accept such employment does not waive their rights to reinstatement in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999).

(f) Within 14 days after service by the Region, post at its facility in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 1997. *Excel Container, Inc.,* 325 NLRB 17 (1997).

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to immediately reinstate Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, or any other unfair labor practice striker, to their former pre-strike positions after their unconditional offer to return, by conditioning their reinstatement upon their acceptance of the terms and conditions of employment set forth in our unlawfully implemented final contract proposal of April 1994.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, rescind and invalidate all offers of reinstatement to unfair labor practice strikers that are contingent upon their accepting the Respondent's unlawfully implemented wages and benefits put into effect on April 14, 1994.

WE WILL offer unfair labor practice strikers Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, immediate and full reinstatement to their former pre-strike jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing if necessary any employees hired as replacements for them.

WE WILL make Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, whole from the date of their unconditional offers to return to work in accordance with the *Grinnell I* remedial Order of the Board.

WE WILL remove from our files any reference to the refusal of Billy J. Cofer, Edward L. Culbert, Charley Wayne Gunkel, Jerry Spencer, and Robert Hensley, to accept employment on the terms that we previously offered them, and WE WILL notify these employees in writing that this has been done and that their prior refusal to accept such employment does not waive their rights to reinstatement in any way.

GRINNELL FIRE PROTECTION SYSTEMS COMPANY